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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 521

PERRY BOWEN MOORE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

PAGE

Petition for Writ of Certiorari 1

Opinion Below (See Appendix A) 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions, Statutes and Regulations Involved 8

Statement of the Case
- The Facts 8
- Form and History of Action Showing Jurisdiction in Courts Below 18

Reasons for Granting the Writ 20

Conclusion 29

Appendix A
- Opinion and Judgments by the United States Court of Appeals for the Seventh Circuit in Nos. 11127 and 11222, United States vs. Moore, December 9, 1954 ..... 1a

Appendix B
- Text of Statutes and Regulations Involved 14a

Cases Cited.

Annett v. United States, June 26, 1953, 205 F. 2d 689 (CA-10) 22, 26

Brewer v. United States, 211 F. 2d 864 23

Dickinson v. United States, 346 U. S. 389 20

Jessen v. United States, May 7, 1954, 212 F. 2d 897 (CA-10) 20, 22, 26

Niznik v. United States, 1950, 184 F. 2d 972 (CA-6) 27

PAGE

Pine v. United States, April 5, 1954, 212 F. 2d 93 (CA-4) 20

Taffs v. United States, December 7, 1953, 208 F. 2d 329 (CA-8) 22, 26

United States v. Balogh, 157 F. 2d 939 23

United States v. Cain, 149 F. 2d 338 23

United States v. Close, June 10, 1954, 215 F. 2d 439 (CA-7) 22, 26

United States v. Everngam, 1951, 102 F. Supp. 128 ..... 24, 26, 27

United States v. Niznik, 173 F. 2d 328, cert. den. 337 U. S. 925, 93 L. Ed. 1733, 69 S. Ct. 1169 24

United States v. Romano, S. D. N. Y., 1952, 105 F. Supp. 597 ..... 22, 26

United States v. Simmons, 213 F. 2d 901 ..... 20, 11a

United States v. Wilson, July 15, 1954, 215 F. 2d 443 (CA-7) 21, 25, 28

STATUTES AND REGULATIONS CITED.

Federal Rules of Criminal Procedure, Rules 37(b) (2), 45(a) 2

26 ..... 3a

Regulations, Selective Service (32 C. F. R., Sec. 1602 et seq.)

Section

1622.1(d) 16a

1622.14 ..... 16a

1625.2 ..... 4, 17a

1626.13 ..... 5, 11, 17a

1627.1-.8 5

United States Code, Title 18, Sec. 3231 ..... 2, 19

United States Code, Title 28, Sec. 1254(1) 2

PAGE

United States Code, Title 50, App. Sec. 451-470 (Universal Military Training and Service Act)

Section

10(b)(3) 4, 4a
1(c) 14a
6(j) 8, 7a, 14a
12(a) 16a

UNITED STATES CONSTITUTION.

Fifth Amendment 8
Sixth Amendment 8
Fourteenth Amendment 8

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

OPINION BELOW.

The opinion of the Court of Appeals of December 9, 1954, Nos. 11127 and 11222, is not yet reported. It appears as Appendix A to this petition.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 9, 1954, and this Petition for Writ of Certiorari is timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b) and 45(a), Federal Rules of Criminal Procedure. Title 18, Section 3231, United States Code, confers jurisdiction on the trial court.

QUESTIONS PRESENTED.

I.

The undisputed evidence showed that petitioner had conscientious objections to participation in both combatant and noncombatant military service. He showed that these objections were based on his sincere belief in the Supreme Being. The file established without dispute that his obligations were superior to those owed to the state or which arose from any human relation. There was no showing that those beliefs flowed from any political, philosophical or sociological views. The undisputed evidence showed that the objections were based on the Word of God and the obligations that Moore had to the Supreme Being.

The question here presented, therefore, is whether the denial of the claim for classification of petitioner by the Presidential Appeal Board as a conscientious objector was without basis in fact and, consequently, the final 1-A-O classification was arbitrary and capricious.

II.

Petitioner was a factory worker in a small factory known as "Community Industries," a commercial enterprise owned by certain members of the Church of Jesus Christ, to which Church he belonged.

Part of this factory's production—ladies' dresses and candy—was purchased by the United States Government. The Court of Appeals held that because of this, petitioner was not a conscientious objector.

The question here presented, therefore, is whether the Act and the Regulations permit the Presidential Appeal Board to deny the conscientious objector status because the factory in which petitioner worked sold candy and ladies' dresses to the United States Government.

III.

Petitioner is a member of the Church of Jesus Christ, also known as the "Harshmanites."

In 1950, the 4-E classification of the older Harshmanites (equivalent to the present 1-O classification) was changed to 1-A. Petitioner's file contains the information the then draft board member, Sabin, stated in a speech to the Senior High School class that certain conscientious objectors had been put in 1-A to delay the induction of other young men (Pl. Ex. A, R. 20) The Appeal Board affirmed the 1-A classification. These files were returned to the Local Board in December, 1951. The classification of petitioner, Moore, was at that time 1-O, given by the Local Board in November, 1951. On December 13, 1951, the Local Board, because other Harshmanites' filles had been returned as 1-A from the Appeal Board (R. 95-96), changed Petitioner's classification to 1-A.

Under the law and the Selective Service Regulations, the classification as conscientious objector depends on the individual. Selective Service Regulation 1622.1 states that there shall be no discrimination for or against a registrant because of his membership in any religious

organization. The law relates to the individual and not his church nor other members thereof in its definition of a conscientious objector as one who is conscientiously opposed to war because of religious training and belief.

The question here presented, therefore, is whether petitioner was denied procedural due process and a fair hearing before his Local Board in view of the fact that his classification was changed because of change in classification of other members of his Church.

IV.

Section 10(b)(3) of the Selective Service Act, 50 App. 460(b)(3), creates three separate agencies; *i.e.*, the Local Board, State Appeal Board and Presidential Appeal Board. Each agency can determine the classification of petitioner. Petitioner was denied due process before the Local Board, as it changed his classification on December 13, 1951 from 1-O to 1-A because the State Appeal Board had approved change of classification of other members of his Church. He did not receive the independent judgment of the Local Board as required by law.

The question here presented, therefore, is whether petitioner is denied due process under the Regulations when one of the agencies abdicates its function of independent judgment.

V.

Selective Service Regulation 1625.2 provides that the Local Board may reopen and consider anew the classification of a registrant upon its own motion if such action is based upon facts not considered when the registrant was classified, which, if true, would justify a change in registrant's classification.

There were no true new facts justifying the change of classification when in December, 1951, the Local Board changed petitioner's classification, and petitioner was therefore deprived of due process under the Regulations.

The question here presented, therefore, is whether petitioner was denied due process under the Regulations, since his classification was changed by the Local Board in contravention of the Regulations.

VI.

Petitioner was classified 1-A-O by the Presidential Appeal Board. This is not a hearing *de novo* as petitioner may not appear in person nor present witnesses in his behalf. Selective Service Regulation 1626-13 provides that if any information considered by the Local Board does not appear in the file, the Local Board shall prepare and place in the file a written summary of that information. The Local Board placed in his file an untrue and unfair written summary of evidence considered by it (Pl. Ex. A-14).

Selective Service Regulations 1627.1-.8 provide that the Presidential Appeal Board may consider only the Selective Service file of the registrant, The Court of Appeals nevertheless considered this a hearing *de novo,* ignoring the unfair and untrue written summary by the Local Board contained in the petitioner's file, and held that petitioner was not prejudiced thereby. The unfair and untrue statements therein could not have been answered by petitioner, since he could not have known that the statements were unfair and untrue until the trial of the case in court. Further, the Presidential Appeal Board must have considered this Summary, since it was in petitioner's file.

The question here presented, therefore, is whether petitioner was prejudiced because of unfair and untrue matter contained in his file which file alone was before the Presidential Appeal Board, and thus denied due process under the Regulations.

VII.

The Presidential Appeal Board gave no reasons whatever for the ordering of petitioner to be classified 1-A-O. Since the file as a whole was before the Presidential Appeal Board, it is impossible to know in the absence of a statement from the Presidential Appeal Board, exactly why it classified petitioner as 1-A-O. The file contains matter which is prejudicial to the petitioner and which he had no opportunity to refute, as it was not known to him until the trial. The Court of Appeals cannot impose its judgment on the file and conclude, as it has, exactly what in its opinion, might have prompted the Presidential Appeal Board to decide upon the 1-A-O classification and what matter contained therein did not sway the Presidential Appeal Board.

The question here presented, therefore, is, since the file contained prejudicial matter, whether or not the Presidential Appeal Board may have based its determination on this prejudicial matter, which petitioner had no opportunity to counter, and therefore its classification rests upon no basis in fact.

VIII.

The Court of Appeals held that the "willingness" of the Harshmanites "* * * to profit from the remote activities of a wartime economy" is a reason for the denial of conscientious objector status. This is no valid basis

in fact whatever since anyone who is employed may be said to profit from the remote activities of a wartime economy.

The question here presented, therefore, is whether a standard such as profit from the remote activities of a wartime economy is so vague as to be void and deprive petitioner of due process under the law and the Regulations.

IX.

The Court of Appeals held that "the teachings of a sect may be such that a registrant is placed in the anomolous position of being subject to an inductible classification unless he is willing to repudiate the doctrines of the church on whose teachings his claim of exemption rests." However, there is nothing in the religious tenets of petitioner's Church incompatible with the 1-O classification; in fact, the beliefs and lives of the Harshmanites are in accordance with the Word of God.

The question here presented, therefore, is whether petitioner was denied free exercise of religion because the Selective Service system made a value judgment as to which of his religious tenets are proper and which they consider improper.

X.

Rule 26 of the Rules of Criminal Procedure provides that the admissibility of evidence and the competency of witnesses are governed by the common law as that may be interpreted by the courts in light of reason and experience.

Petitioner and three other witnesses for the defense desired to testify at the trial (R. 138-140). The trial court refused to allow them to testify on the ground that they would not take the oath or affirmation (R. 139-140).

Their offer of proof was refused (R. 139). The purpose of the oath or affirmation is that the person testifying realize he is under penalty of perjury. These witnesses and petitioner stated they were bound to tell the truth and well realized the consequences of perjury (R. 138-140).

The question here presented, therefore, is whether petitioner was denied procedural due process under the Fifth, Sixth and Fourteenth Amendments in his trial, as the trial court did not permit him and three other witnesses to testify for the defense.

STATUTES AND REGULATIONS INVOLVED.

The Universal Military Training and Service Act, 62 Stat. 604, 612, 622, 65 Stat. 75, 86, particularly Section 6(j), 50 U.S.C. App. (Supp. V.), Sec. 456(j) is involved. Also involved are pertinent Selective Service Regulations 1622, 1625, 1626, 1627 (See Appendix "B"), and The Fifth, Sixth, and Fourteenth Amendments.

STATEMENT OF THE CASE.

The Facts.

Perry Bowen Moore is a registrant from Sullivan, Illinois, a town of 3,200 persons. He is a member of the Church of Jesus Christ in Sullivan. The Church has a congregation of 220 including children, and a membership of about 135. As to the religious history of petitioner and his Church, his Selective Service file (Pl. Ex. A, R. 20) contains information hereinbelow set forth. The ancestors of the Harshmanites emigrated to this country from Bavaria in 1751 to seek religious liberty. Rev. S. R. Harshman, father of the present Pastor, Rev. Leah L. Harshman, was a member of the Illinois Methodist Conference, and while a pastor in Jacksonville, Illinois, built the Brooklyn Methodist

Church. His devotion to the Wesleyan doctrine of holiness of heart and life caused him to separate from the Methodist Conference and become an evangelist. During the 1870's he established the Church of Jesus Christ in Sullivan, Illinois.

In 1918 all members of the Harshmanite Church employed by townspeople in Sullivan were dismissed from their jobs because of their religious position on the draft. All in business were boycotted. One Harshmanite was inducted into noncombatant service during World War I and because of the military pressure became insane and has remained so ever since. Personal assaults upon the Harshmanites were made in the years following. Their chapel was painted yellow by the townspeople. Their pastor, over eighty years of age, was personally attacked. Thieves, knowing the Harshmanites would not prosecute, continually broke into homes.

> "Through it all, we held firmly to an obedience to the commands of Christ * * * Christ gives us a surpassing example of this spirit when while exposed on the cross to the hatred and contempt of the multitude he prayed, 'Father forgive them; they know not what they do.'" (Pl. Ex. A, R. 20.)

So it was that some Harshmanites started a small manufacturing enterprise, "Community Industries," that they and other Harshmanites may make a living. In the Second World War, most of their production was on Government work—candy and ladies' dresses (R. 113). The factory employed non-Harshmanites, as well as Harshmanites. The Harshmanites were recognized as conscientious objectors. The Church paid all expenses of their Civilian Public Service Camp service and supported their dependents.

In 1950, the Harshmanites' classifications of 4-E (at that time conscientious objector classification, now called 1-O) were changed to 1-A (R. 215). Then Draft Board member Sabin stated in a speech to the members of the senior class of the high school that certain conscientious objectors had been put in 1-A to delay induction of other young men.

The Appeal Board upheld these 1-A classifications (R. 215).

Perry Bowen Moore, petitioner, registered with his Local Board. On April 2, 1951 he filed a Classification Questionnaire on the basis of which Board 177 classified him 1-A. This was a preliminary classification (R. 14), (S.S.R. 1622.1(c). He signed Series 14 of such Questionnaire indicating conscientious objection to war in any form.

On the Special Form for Conscientious Objectors, petitioner answered that he believes in a Supreme Being, that he believes in the Son of God and this involves duty superior to that arising from any human relation. He explained that he received his religious training by going to Church all his life and from the doctrines taught in his church. He does not believe in the use of force of any kind. He has gone to the Church of Jesus Christ all his life.

In describing the creed of his religious organization relating to participation in war, he answerered that the Bible says you shall love your enemies and to go to war with them is not showing love.

Petitioner requested a personal appearance before the Local Board and so appeared on November 1, 1951 (R. 22). Following his personal appearance, the Local Board

voted unanimously to classify him 1-O (a conscientious objector to both combatant and non-combatant military service who performs work of national importance for two years). Some forty-three days later on December 13, 1951 the Local Board reclassified the petitioner as 1-A. Petitioner appeared before the Local Board again when his 1-A classification was affirmed (R. 23). He appealed to the State Appeal Board. His Selective Service file contained Plaintiff's Exhibit A-14, a Summary, dated January 17, 1952. This Summary was prepared by the Local Board in accordance with Selective Service Regulation 1626-13, which states that the Local Board shall include in the file going up on appeal a summary of information considered by the Local Board but not in the file (R. 23). The Summary in part says that the petitioner was reclassified from 1-O to 1-A due to the consensus of opinion of the Local Board that part of this religious group could not be in 1-A and the other part in 1-O, when all hold the same tenets of religion, and set forth the same statement to uphold their claims as conscientious objectors (R. 23-4). The Summary also states that the cases of other Harshmanites were fully investigated by the Appeal Board and the Local Board felt that such investigations should carry much weight in determining a classification of members of the same faith. "A further weight of evidence" according to the Summary, was the Petition which the Local Board has in its files and which is signed by 354 residents of Moultrie County, who "* * * also do not believe the members of this faith are true conscientious objectors."

The Summary further indicates that "* * * the Board can recognize an objection to taking life but not to noncombatant service. This group objects to both." (R. 25.)

Local Board Chairman Lippincott, editor of a newspaper in Sullivan, testified at the trial that it is possible he would not publish in his newspaper accounts of Harshmanites being subjected to contempt, ridicule and threats (R. 55), and he has read letters in newspapers showing the writers were prejudiced against the Harshmanites (R. 52). He testified further:

"By Mr. Heisler: Q. All right, Mr. Lippincott, the classification of the conscientious objector given on November 1 to Mr. Moore was changed to 1-A on December 13, is that correct, 1951, the same year, one month and thirteen days later?

"By Witness Lippincott: A. That is correct.

"Q. Did the draft board investigate any change in the condition or in the frame of mind of the defendant Moore before the classification of 1-O was taken from him on December 13?

"A. No sir.

"Q. As far as you and your board knew, there was no change in his frame of mind, in his conscientious objection to war between November 1, 1951 and December 13, as far as you knew?

"A. As far as I knew, no, sir.

"Q. Nevertheless, you took away his classification as a conscientious objector?

"A. Yes, sir." (R. 65-66).

Mr. Zook, a Draft Board member, testified:

"A. I believe he was not a true conscientious objector on December 13th.

"By Mr. Heisler: Q. On what did you base your belief on December 13th that he was not?

"A. We had received the files from the Appeal Board. We looked those files over. Within those files was information we did not have at the local board. And we felt, or I felt, I should say, in my own mind, that the Appeal Board had a much better staff than we had. They were much more able, much better

qualified to classify. With information that we received in those files I thought it was the same as a higher court and I was entitled to go by the higher court's decision and in justice to all of the fellows, I could not see how I could put one fellow in 1-O when the Appeal Board had put his buddies in 1-A, and I believe that was the gist.

"Q. So then you concluded that Mr. Moore was not a true conscientious objector on December 13th because the Appeal Board decided that some other members of the Harshmanite Church were not true conscientious objectors, is that true, Mr. Zook?

"A. I believe that is correct." (R. 95-96.)

Another Draft Board member, Mr. Morgan, testified that the Draft Board received other Harshmanite files from the Appeal Board "* * * and went according to their recommendations." (R. 125.)

Mr. Glancy who was not a member of the Draft Board in November when Moore was classified 1-O but was on the Board in December, 1951 and voted to change the classification to 1-A (R. 128), stated that the facts upon which he decided that defendant Moore should be made available for military service were other Harshmanite files that had been returned from the Appeal Board (R. 129).

One Draft Board member, Mr. Watkins, didn't know one single fact upon which Moore's classification was changed and he didn't know whether the Board had the same information in November as it had in December (R. 133-4).

Chairman Lippincott testified that he knew on December 13, 1951 what materials the Harshmanites produced in their little factory. He also testified he knew this on November 1, 1951 (R. 69). When asked what happened

between November 1, 1951 and December 13, 1951 to prompt the Board to change petitioner's classification, he replied: "A report from the Justice Department" and when questioned further admitted that the report was dated December 22, 1952, *i.e.*, one year later (R. 71). He testified further that he could not at this time tell one single fact brought to his attention between November 1, 1951 and December 13, 1951 which in his own opinion justified the change of Moore's classification. (R. 73).

As to the Petition (Def. Ex. 1. R. 131), only one, Mr. Lippincott, out of the five draft board members saw it. (R. 94, 122, 131, 134). Of the four who never saw it, two testified that Lippincott told them what he thought the Petition said (R. 94, 122).

Yet this Petition which four out of five Draft Board members never saw is a "further weight of evidence" mentioned in the Draft Board Summary which caused them to change petitioner's classification.

The Draft Board members testified that it was new evidence and upon it Moore's classification was changed (R. 72, 94, 117, 131).

In petitioner's motion for a New Trial on the Ground of New Discovered Evidence, there is submitted a letter to the Appeal Board, dated April 1, 1953, from this same Local Board signed by the Local Board and contained in the file of Mr. Hal Romaine Harshman, another registrant (R. 204). It states that the Petition was returned to the Local Board in March, 1951, so it could not have been a new fact to cause change of classification. Nevertheless, the Motion for New Trial on the Ground of Newly Discovered Evidence was denied (R. 219), from which Petitioner also appealed.

Board member Morgan testified that he never saw the Petition but that Mr. Lippincott, the chairman, told him that the Petition claimed that the signers do not believe that the members of the Harshmanite Church are true conscientious objectors (R. 122). Mr. Zook, another Draft Board member, never saw the Petition and the Draft Board Chairman Lippincott informed him of its gist (R. 94). Draft Board member Glancy doesn't know what is in it and never saw it (R. 131). The last Draft Board member, Mr. Watkins, never saw the Petition and does not know what it contains (R 134).

The Petition (Def. Ex. 1, R. 131) says:

> "We the undersigned citizens of Moultrie County, Illinois, do hereby petition you, the Illinois Selective Service System, that all eligible men who claim to be conscientious objectors due to membership in the Church of Jesus Christ (commonly known as the Harshmanite Church) be drafted into Military Service of the United States of America."

Yet the Draft Board Summary states that the signers of the Petition "also do not believe" the Harshmanites "are true conscientious objectors." Petitioner obtained the Petition at the trial in court by *subpoena duces tecum* served upon the Deputy Director of Selective Service, Mr. Felt (Def. Ex. 2, R. 30, 34).

The Petition was not included in petitioner's Selective Service file, nor was it a part of that file (R. 149). The Petition was lodged in the confidential file of the Local Board, and was not taken out of the Local Board's confidential file until production at the trial pursuant to *subpoena duces tecum* (R. 81, 136).

After being re-classified 1-A in Dec. 1951 by the Local Board, petitioner was given a hearing in January, 1952,

after which the Local Board affirmed his 1-A classification.

Petitioner submitted a statement into his file that at the Local Board hearing in January, 1952, he was told that other Harshmanites have been placed in 1-A by the Appeal Board and that the Local Board was following the example of their superiors and putting all Harshmanites in 1-A; the Local Board also stated that the church was not a national church and that there was not any such thing as a sincere conscientious objector. Petitioner objected and stated that in the past war the Harshmanites were registered in Washington as a conscientious objector religious group. He also stated that his family has upheld the religion taught in its Church and that two of his brothers spent several months in conscientious objector camps during World War II, upholding the same principles upon which he bases his life. He has attended the Church of Jesus Christ all his life; is a member in good standing, which was also attested to by his Pastor; and he attends all weekly meetings. He upholds the principles of his Church as to non-resistance and showing love for one's fellowman and returning good for evil. He states that to be in military service would be directly against the principles upon which he bases his life.

His Pastor, Rev. Leah L. Harshman, submitted to the Appeal Board the history of the Church of Jesus Christ in Sullivan and the account of its doctrines and other data including articles, published in a local newspaper, and data concerning the Harshmanites' work in Civilian Public Service Camps during World War II. This information is contained in petitioner's Selective Service file. Rev. Harshman stated that service in the army whether combatant or non-combatant, is against the principles of

the Church because the Church accepts a binding obligation to obey in all things Christ's Law of love. They are willing to produce articles needed by the Government. However, they will not willingly engage in the production of any articles used directly to cause death and they cannot be part of army personnel under military command because of their religious beliefs, and cannot take part in any way in the hatred and violence which is war. A religious tenet of the Church of Jesus Christ is the renunciation of the earthly sword and instead the upholding of the weapon of the Spirit, which is the Word of God.

Petitioner had a hearing before the Hearing Officer of the Department of Justice, who recommended that he be classified 1-O. The Hearing Officer found:

> "An acquaintance who has known the registrant many years, states that his religious training and his good moral character indicates he is sincere. Another neighbor remarked that registrant has never associated with anyone of questionable character and his behavior indicates his sincerity. A co-worker feels that on the basis of his good reputation, the registrant's stand is conscientious. A school superintendent advises that the registrant conducted himself as a 'perfect gentleman' in high school, was never a disciplinary problem, and was in the upper half of his class. He believes that on the basis of his religious training throughout his life that registrant's claim is made in good faith. The Hearing Officer found that the registrant was a bona fide member of the Christian Church and that he had followed strictly its teachings. On the basis of the registrant's appearance before him and the unanimous and favorable comment contained in the Federal Bureau of Investigation report he recommended that registrant be exempted from both combatant and noncombatant service." (Pl. Ex. A, R. 20)

The Department of Justice nevertheless recommended, contrary to the Hearing Officer, that petitioner be classified in 1-A-O. The Department of Justice states that while registrant in its view has sincere religious conviction against the taking of life and bearing of arms, that his employment in a factory which manufactures war goods is inconsistent with his claim to exemption from non-combatant service.

Rev. Harshman pointed out the practical inconsistency of the point-of-view of the Department of Justice in that if any production which is helpful to the Government deprives one of a conscientious objector classification, then the growing of essential crops, the payment of taxes, and other duties of loyal Americans should equally deprive one of a conscientious objector classification. She also states her trust that as long as America upholds the right of Christ to obedience on the part of His followers, this will be sustained by the law.

The State Appeal Board retained Moore in 1-A. In 1952 an Appeal was processed to the Presidential Appeal Board, also called National Appeal Board. The Presidential Appeal Board ordered petitioner classified 1-A-O (non-combatant service) by a split vote—two to one. On October 21, 1953, Perry Bowen Moore, who then had received his Order to Report for Induction as 1-A-O, reported to the Recruiting Station, took his examination, was found acceptable, and at the time for induction, he refused to submit to induction.

Form and History of Action and Jurisdiction in Courts Below.

This criminal action was brought by Indictment charging petitioner with violation of the Universal Military Training & Service Act (Title 50 App. U. S. C. Section

462) for failing and refusing induction into the Armed Forces. The District Court took jurisdiction under 18 U. S. C., Section 3231. Petitioner pleaded not guilty (R. 6). The case proceeded to trial before the court without a jury, which was waived (R. 6). At the close of the Government's case, petitioner made his motion for a judgment of acquittal which was denied (R. 111). At the close of all the evidence, petitioner made his motion for judgment of acquittal, which was denied (R. 149). The trial court found petitioner guilty and entered a judgment and commitment, sentencing the petitioner to the custody of the Attorney General for two years. (R. 167-177 and R. 6-7). Petitioner made motions for a new trial and arrest of judgment which were denied (R. 172-3).

A Notice of Appeal to the United States Court of Appeals for the Seventh Circuit and Statement of Points were duly and timely filed (R. 178-182). Thereafter petitioner appeared before the court on a Motion for a New Trial, based on the ground of vital and material newly discovered evidence, with attached affidavits (R. 191-206). The Government filed its Points and Authorities in Opposition to Motion for New Trial with Affidavits (R. 207-216), to which the petitioner replied (R. 217-9). The court denied petitioner's motion for a new trial (R. 219) from which Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, and Statement of Points were duly and timely filed (R. 222). On December 9, 1954, the Court of Appeals for the Seventh Circuit affirmed both judgments.

REASONS FOR GRANTING THE WRIT.

I.

The Court below decided this case in accordance with the principles it announced in *United States* v. *Simmons*, 213 F. 2d 901 (Appendix A, p. 7a). The *Simmons* case decided that the

> "Defendant contends, on authority of *Dickinson* v. *United States*, 346 U. S. 389, that the denial of a conscientious objection claim has a basis in fact only when the board has procured affirmative evidence which contradicts the representations made by a registrant in his application for exemption,—that the board must make a record to support its order. The *Dickinson* opinion has been so construed in *Weaver* v. *United States*, 210 F. 2d 815, 822-823 (CA-8); *Schuman* v. *United States*, 208 F. 2d 801 (CA-9); and *Jewell* v. *United States*, 208 F. 2d 770, 771 (CA-6). However, we do not read the decision as authority for this proposition."

The decision below also conflicts with *Jessen* v. *United States*, 10th Cir., May 7, 1954, 212 F. 2d 897, *Pine* v. *United States*, 4th Cir., April 5, 1954, 212 F. 2d 93, and *Dickinson* v. *United States* 346 U. S. 389.

II.

The Court below has decided that the civilian occupation of petitioner, a factory worker in a plant which has sold candy and ladies' dresses to the United States Government, means that petitioner did not meet the statutory test for exemption. This holding directly contradicts a Selective Service case decided in July, 1954 by the same Circuit Court of Appeals for the Seventh Circuit. *United States* v. *Wilson*, 215 F. 2d 443. The *Wilson* case holds that:

"It would be wholly unrealistic to construe this language to mean that a person whose civilian employment indirectly contributed to the war effort could not, therefore, meet the statutory test for exemption. *Such a construction of the Act would completely nullify the provisions granting exemption to conscientious objectors, for it is difficult to conceive of any gainful activity, which, in periods of extensive mobilization and training, would not in some manner aid the common purpose. Moreover, the Act expressly recognizes that one may engage in civilian work contributing to the national welfare without thereby losing the right to be classified as a conscientious objector.* Section 6(j) provides that persons conscientiously opposed to noncombatant service in the armed forces shall be ordered to perform 'such civilian work contributing to the maintenance of that national health, safety, or interest' as may be considered appropriate by the local board. It is perfectly clear in this case that the nature of the defendant's civilian occupation could not be a basis in fact for denying him the status of a conscientious objector." (Emphasis supplied)

It is submitted, therefore, that there is a direct conflict on the same matter within the Court below. This conflict gives the ground for the granting of certiorari to settle the issue. This is a substantial and an important question of law which has not been determined but which ought to be decided by this Court.

III.

The Court below has decided that even granting that the Local Board's written Summary of evidence considered by it was unfair and untrue, nevertheless the petitioner was not prejudiced thereby. "He was given the opportunity to place whatever he desired in his file

on appeal". Further, "The Presidential Appeal Board did set aside the 1-A classification and give the defendant the 1-A-O * * * the classification on which his induction order was based is not subject to collateral attack on this ground."

The Court of Appeals ignores the fact that as to certain important statements in the Summary, petitioner could not have known until the trial of the cause that the statement was unfair and untrue and consequently could not possibly have refuted it. There was thus a defective link in the chain of administrative proceedings and the entire chain is void. *United States* v. *Romano,* S. D. N. Y., 1952, 105 F. Supp. 597; *Annett* v. *United States,* 10th Cir., June 26, 1953, 205 F. 2d 689; *United States* v. *Close,* 7th Cir., June 10, 1954, 215 F. 2d 439; *Taffs* v. *United States,* 8th Cir. Dec. 7, 1953, 208 F. 2d 329; *Jessen* v. *United States,* 10th Cir., May 7, 1954, 212 F. 2d 897. Because the Petition was in the Board's confidential file, he had no access to it and was not given a fair summary of it. He thus was precluded from submitting any evidence into his file relative to the Petition.

Never having the opportunity of seeing it, he could not know whether 354, or any number of persons believed the Harshmanites not to be true conscientious objectors. He could not know that the Petition in reality said nothing about true conscientious objection and read only that all eligible men, who claim to be conscientious objectors due to membership in the Church of Jesus Christ (commonly known as the Harshmanite Church) be drafted. He was forever prevented from ascertaining whether the signers did so sign; if they believed he should be denied 1-O; if they knew what they were signing; or whether there were any reason for their feeling; or if

they had religious prejudices. Since he was precluded from this information he could not have pointed out any of these factors in his file for the consideration of the Presidential Appeal Board.

Thus, petitioner was denied that equal access to information and the opportunity to submit rebuttal or explanatory material into his file, which are essentials of a fair consideration. The Presidential Appeal Board was denied the benefit of petitioner's presentation of the facts and therefore its determination of 1-A-O was not bottomed on a basis in fact.

In *U. S.* v. *Balogh,* 157 F. 2d 939, Judge Learned Hand had before him a case in which the findings of an anonymous "Panel" were made use of.

> "We cannot find that Balogh was told the names of the members [of the Panel]. As the case comes to us, the board made use of evidence which Balogh had been unaware and *which he had no chance to answer;* a prime requisite of any fair hearing." (Emphasis Supplied).

Previously, in *U. S.* v. *Cain,* 149 F. 2d 338, examining a similar set of facts Judge Hand stated:

> *"That was no technical irregularity of procedure, it went to the very heart of the controversy and vitiated the whole proceeding."* (Emphasis supplied)

In *Brewer* v. *United States,* 211 F. 2d 864, the draft board had access to a Federal Bureau of Investigation report which was denied to defendant. His final classification was made by the Appeal Board. Nevertheless, the court held that "• • • to deny registrant equal access to the evidence upon which his case is determined is to reject our basic concept of due process."

As it was said in *United States* v. *Everngam,* 102 F. Supp. 128:

> "The registrant is entitled to have a report and recommendation that is not arbitrary. Without it he is denied due process of law. Had such a report and recommendation been made, who can say that the hearing officer would not have recommended a different classification, or that the appeal board would not have made a different decision?" (p. 131).

Had the Summary been fair, who can say that the Presidential Appeal Board would not have made a different decision? Further, the holding of the Court of Appeals for the Seventh Circuit is in direct conflict with the decisions of the Sixth and Fourth Circuits. See *United States* v. *Niznik*, 173 F. 2d 328, cert. den. 337 U. S. 925, 93 L. Ed. 1733, 69 S. Ct. 1169. In the *Niznik* case the Local Board classified the registrant 1-A and the Appeal Board gave him a new classification of 4-E (he had requested 4-D). The Court of Appeals for the Sixth Circuit held as follows:

> "It may be remarked that the Government contends that any deficiency in the record on appeal was immaterial and gave defendant no right to complain because he had the power himself to correct the record under the provisions of Section 627.12 of the Selective Service Regulations, which provide that a registrant who takes an appeal to the Board of Appeal may attach to his Notice of Appeal or the Selective Service Questionnaire a statement specifying the respects in which he believes the Local Board erred, may direct attention to any information in the registrant's file which he believes the Local Board has failed to consider or give sufficient weight, and may set out in full any any information which was offered to the Local Board and which the Local Board failed or refused to include in the registrant's file. In passing upon a similar contention of Government Counsel in *Smith* v. *United States*, *supra* [Fourth Circuit] 157 F. 2d at page 183, the Court,

in a statement in which we concur said: 'In our opinion this regulation does not relieve the Local Board of its duty in the premises or mitigate the consequences of a failure on its part. The regulation confers a privilege but does not impose a duty upon the registrant, for it cannot be supposed that Congress intended to deal with registrants as if they were engaged in formal litigation, assisted by counsel, and therefore charged with the obligation to examine and approve a record on appeal' • • •

"The findings of the Local Board are subject to attack when the Board arbitrarily deprives the registrant of a hearing in accordance with due process. *Poole* v. *United States, Fourth Circuit,* 159 F. 2d 312."

Therefore, the two cases above are identical with petitioner's case in that the higher Governmental agency gave the registrant a different classification than the Local Board. Further, petitioner was denied due process by the Local Board and a fair consideration by the higher Boards, as were registrants in these cases. Nevertheless, the holdings are appositive.

It is submitted, therefore, that there is a direct conflict between the holding of the Court below and the holdings of other Courts of Appeals on this question. This gives basis for granting the Writ of Certiorari.

IV.

The holding of the Court of Appeals that anyone who profits from the remote activities of a wartime economy cannot meet the conscientious objector classification is so vague as to be void and deprive petitioner of due process of law. It also conflicts with the recent Seventh Circuit opinion in *U. S.* v. *Wilson,* 215 F. 2d 443. This is a new and important question of law which has not been determined but which ought to be decided by this Court.

V.

It was not the intent of Congress in granting the conscientious objector classification that anyone who supports the Government, for example, by paying taxes, raising essential crops, or as in this case producing necessary items—such as candy and ladies' dresses—should be foreclosed from the conscientious objector status. In fact, the law provides that one who is given 1-O shall perform work of national importance for two years. Thus, the Court of Appeals in the instant case has disregarded the intent of Congress and this raises substantial questions of law which ought to be determined by this Court.

VI.

Insofar as the Local Board changed petitioner's classification from 1-O to 1-A because he was a Harshmanite, petitioner was deprived of due process and a fair hearing before his Local Board. There was thus a defective link in the chain of administrative proceedings and the entire chain is void. *United States* v. *Romano,* S.D.N.Y., 1952, 105 F. Supp. 597; *Annett* v. *United States,* 10th Cir., June 26, 1953, 205 F. 2d 689; *United States* v. *Close,* 7th Cir., June 10, 1954, 215 F. 2d 439; *Taffs* v. *United States,* 8th Cir., Dec. 7, 1953, 208 F. 2d 329; *Jessen* v. *United States,* 10th Cir., May 7, 1954, 212 F. 2d 897. The Court of Appeals holds that "The Presidential Appeal Board did set aside the 1-A classification and give the defendant the 1-A-O * * * the classification on which his induction order was based is not subject to collateral attack on this ground." The situation is the same as *United States* v. *Everngam,* 1951, 102 F. Supp. 128, where the defendant was a Catholic and the Hearing Officer recommended he be denied classification as a conscientious objector for this reason. The Court there stated as follows:

"'The report and recommendation of the hearing officer denied defendant the right to be classified as a conscientious objector because he was a Catholic and was therefore arbitrary and invalid. The Appeal Board considered this invalid report and recommendation in making its subsequent classification of defendant, in which he was denied classification as a conscientious objector and placed in Class 1-A, thereby making the Appeal Board and the subsequent Induction Order invalid. The arbitrary report and recommendations of the hearing officer was a denial of due process of law.'' (p. 130)

In *Niznik* v. *United States,* 184 F. 2d 972, the judgments were reversed, convictions were set aside, and appellants were discharged. The draft board classified appellants 1A; the appeal board 4E. The testimony at the trial indicated that a draft board member had said "• • • they could not give a Jehovah's Witness a 4-D. As far as Jehovah's Witnesses are concerned, no 4-D for them." Particular attention was given by the Court to the draft board Chairman's testimony. The Court concluded as follows:

> "Although the members of the draft board performed long, laborious and patriotic duties, nevertheless, their ruling in this regard, that appellants were not entitled to classification as ministers of religion, 4-D, was based not upon the evidence or information is appellants' file, or upon a belief in the truthfulness of the statements made by appellants, but upon the fact that they were members of Jehovah's Witnesses." *Niznik* v. *United States* (1950), 184 F. 2d 972, Sixth Circuit.

The opinion of the Seventh Circuit in the instant case directly conflicts with *Niznik* v. *United States,* 184 F. 2d 972, and *United States* v. *Everngam,* 102 F. Supp. 128, and raises important questions which ought to be settled by this Court.

VII.

In *United States* v. *Wilson*, July 15, 1954, 215 F. 2d 443, decided by this Court, Wilson was classified 1-O by a unanimous vote of his local board, as was petitioner in the instant case in November, 1951. In the *Wilson* case, as in the instant case, the matter was considered by the National Selective Service Appeal Board, which, as in the *Wilson* case, *without stating any reasons therefor*, "* * * without seeing the defendant and acting only on his file * * *," gave defendant a new classification differing from both the local board and the State Appeal Board.

The Court of Appeals for the Seventh Circuit held in the *Wilson* case that:

> "The record here before us reveals no lawful basis for the National Board's classification. The defendant's veracity was not challenged * * *"

As Judge Schnackenberg remarked in his concurring Opinion:

> "The duty imposed on the boards is to determine subjectively and objectively the sincerity of the individual's belief, not the nature of the teachings of any religious faith. * * * The Service boards in Indiana, through his personal appearance before them, had an opportunity to observe his demeanor, which is not produced in the record. They evidently believed him, as shown by their classifying him 1-O."

In the instant case, the *Local Board and the Hearing Officer, who were the only ones to have seen petitioner, believed him entitled to 1-O.* (R. 65, 66, 163)

Thus, the Decision of the Court below in the instant case is directly in conflict with the *Wilson* Decision handed down by it but a few months earlier. This con-

flict gives a ground for the granting of certiorari so that this Court may decide an important question of law.

VIII.

The Court of Appeals has held that it was not error for the Trial Court to exclude the testimony of petitioner and his three witnesses who would not take the affirmation because of religious tenets. There is no statutory requirement for an affirmation or oath. The purpose is solely that the penalties of perjury attach. Petitioner and his witnesses knew that such consequences attached and stated that they were bound to tell the truth. Nevertheless, the Trial Court excluded their testimony and their offer of proof. This is a novel question. In the interests of procedural due process and the conduct of trials in the Federal courts, it should be decided by this Court.

CONCLUSION.

For the reasons above stated, it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

PERRY BOWEN MOORE,
Petitioner.

By: FRANCIS HEISLER and
PEARL BAER,
His Attorneys.

FRANCIS HEISLER,
Of Counsel.

Chicago, Illinois
January 3, 1955.

APPENDIX "A".

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

OCTOBER TERM AND SESSION, 1954.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 11127. *vs.*
PERRY BOWEN MOORE,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 11222. *vs.*
PERRY BOWEN MOORE,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

December 9, 1954.

Before DUFFY, *Chief Judge,* and MAJOR and LINDLEY, *Circuit Judges.*

LINDLEY, *Circuit Judge.* Defendant appeals, in No. 11127, from a judgment of the District Court adjudging him guilty as charged in an indictment of one count of refusing to submit to induction into the armed forces of the United States in violation of the Universal Military Training and Service Act, as amended, 50 App. U. S. C. § 462, and, in No. 11222, from an order of the same court denying his motion for a new trial on the ground of newly discovered evidence.

Defendant registered shortly after his eighteenth birthday. On the basis of his questionnaire, he was given a

preliminary I-A classification. In May, 1951, defendant requested a personal appearance before his local board in order to get his classification changed from I-A to IV-E, the then classification for conscientious objectors to participation in war, the equivalent of the current I-O classification. He was granted a personal appearance on November 1, 1951. In his application for conscientious objector status (SSS Form 150), April 6, 1951, defendant had stated that he was conscientiously opposed to participation in war by reason of his religious training and beliefs acquired through his affiliation with the Church of Jesus Christ of Sullivan. This church, commonly known and hereinafter referred to as the Harshmanites or the Harshmanite Church, is a semi-communal religious sect indigenous and confined to Sullivan, Illinois, and the surrounding vicinity. After his appearance, the local board, on November 5, 1951, classified defendant I-O, *i. e.*, conscientiously opposed to participation in the armed forces in either a combatant or noncombatant capacity.

Meanwhile, the question of the draft status of certain other members of the sect had been on November 1, 1951, presented to the State Appeal Board, which, between that date and December 13, 1951, classified each of the affected registrants I-A. On the latter date, after the files in these other cases had been returned by the state board to the local board, the latter reclassified defendant, placing him in class I-A. He appealed. On January 17, 1952, the local board placed in his file for the appeal board its written summary of the evidence considered by it in reclassifying him. The reasons given were "the consensus of opinion of the Local Board [is] that part of this religious group could not be I-A and the other part I-O when all hold to the same tenets of religion" and the weight accorded to a petition in the files, signed by some 354 residents of Moultrie County who "do not believe the members of this faith are true conscientious objectors." The state appeal board retained defendant in class I-A.

The National Director of Selective Service, General Lewis B. Hershey, having become interested in the Harshmanite cases, in July of 1953 processed an appeal in de-

fendant's case to the Presidential Appeal Board. The latter reviewed defendant's file and placed him in Class I-A-O, *i. e.*, opposed to combatant service but inductible in a noncombatant capacity.

Defendant was ordered to report for induction pursuant to the latter classification on October 21, 1953. He reported, and was accepted, but refused to submit to induction when ordered to do so. The indictment and his conviction followed.

Of the several contentions of error advanced by defendant for reversal of his conviction, we shall consider first the assertion that the trial court's refusal to permit him and certain other witnesses to testify deprived him of a fair trial. Defendant and these certain other members of the Harshmanite church were prepared to testify in his behalf but all refused on religious grounds to take either the oath or to make affirmation. Thereupon, the court refused to permit them to testify.

This was not error. Rule 26 of the Federal Rules of Criminal Procedure, 18 U.S.C., adopts the principles of the common law as the rules governing questions of admissibility of evidence and competency of witnesses, except insofar as the common law has been expressly modified. The requirement of the testimonial oath has been embedded in the principles of the common law for hundreds of years, VI Wigmore on Evidence § 1815, and, as relaxed, by Rule 43 (d) of the Rules of Civil Procedure, 28 U.S.C., which permits "a solemn affirmation" in lieu of the oath, is a part of the common law of criminal procedure applicable in the Federal courts. The constitutional right to a fair trial requires, in this respect, only that the court permit one charged with crime to call and qualify witnesses to testify on his behalf. The court may not exclude the testimony of witnesses who have been duly sworn and are competent to testify. But defendant cannot complain of the inability of himself and other witnesses on his behalf to bring themselves within the solemn requirements of testimonial capacity.

With two exceptions, to be considered separately, the remaining issues raised on these appeals are inextricably bound to, and will be considered with, defendant's principal contention that the judgment must be reversed because there is no basis in fact to support the December 13, 1951, decision of the local board changing his classification from I-O to I-A. It is argued that no new fact was before the board on that date which supported a reopening of his classification; that the board's reclassification of defendant because of his membership in the Harshmanite church was an unconstitutional denial of his rights of freedom of religion and equal protection of the laws and beyond the statutory authority of the local board; that the petition of residents of Moultrie County could not have constituted a valid reason for his reclassification; and that a new trial should have been granted on the ground of newly discovered evidence that all facts before the local board at the time of reclassification were known to the board prior to the time when it classified defendant I-O.

Although apparently this is the theory on which the trial court considered the basis in fact question, the premises are misleading in that they misconstrue the nature of the functions of the administrative agencies provided for by Section 10 (b) (3) of the Act, 50 App. U. S. C. § 460 (b) (3). The three separate agencies, *i. e.*, the local board, state appeal boards and the Presidential Appeal Board, are given concurrent power to determine all questions or claims with respect to classification. The appeal boards are in no judicial sense appellate agencies, but are, rather, agencies superior to the local boards, which consider anew each application referred to them, and determine, on the basis of their own proceedings, the appropriate class for the affected registrant. A classification given by an appeal board is not, therefore, merely an affirmance of the action of an inferior agency, but is the independent act of such board.

Undoubtedly, the confusion which prevails on this question results, as the government suggests, from the fact that only the local board deals directly with the registrant. Notice of the result of a classification hearing before any

appeal board is sent to the affected registrant's local board, which in turn, sends an appropriate notice to the registrant. Likewise, all orders for examinations and induction emanate from the local board, whether based on its own classification or one fixed by its superior agencies. This procedure does not, however, make the action of the appeal board that of the local board.

The "basis in fact" issue in a criminal action brought under the Act is solely a question whether the selective service file which was before the agency which considered the case most recently in point of time reflects a basis in fact to support the classification given by such agency, the classification on which the registrant's induction order is based.

In *Cramer* v. *France*, 148 F. 2d 801 (CA-9), the defendant seeking to set aside an induction order based on an appeal board classification, relied on evidence that the local board was prejudiced against him. The court said at pages 804-5; "In view of the fact that the hearing before the appeal board was de novo, *United States* v. *Pitt*, 3 Cir., 144 F. 2d 169, • • • the prejudice of the members of the local board, if any, was not relevant to the record. • • • We think the trial court is right in its assumption that appellant, having taken an appeal from the local board to the appeal board and secured a ruling by the latter as to his classification, cannot now complain to the court concerning the conduct of the local board. The action of the board of appeals completely supersedes the action of the local board in classifying appellant, although the classification is the same." In *Tyrrell* v. *United States*, 200 F. 2d 8, cert. denied 345 U. S. 910 (CA-9), the defendant contended that the local board, in summarizing for the file on appeal the oral evidence on which it had ruled in classifying the defendant as I-A, had omitted reference to the religious significance of certain work done by him. The file before the appeal board, however, contained documents relating to that subject. The court affirmed a judgment of conviction, saying at page 11: "It will be presumed that the Appeal Board gave consideration • • • to the entire file before it in evaluating the registrant's

status and classifying him as I-A. Such action completely and finally supersedes the action of the local board in classifying Tyrrell, although the classification * * * is the same as that of the local board." To the same effect is *Reed* v. *United States,* 205 F. 2d 216 (CA-9), in which the defendant sought to introduce evidence of unfairness and misconduct of members of the local board at the time of defendant's personal appearance. So too, in *Davis* v. *United States,* 203 F. 2d 853, cert. denied, 345 U. S. 996 (CA-8), the court held that Davis could not attack collaterally in a criminal proceeding the appeal board classification on which his induction had been ordered, by alleging that prior action of the local board had denied him due process, saying at page 857: "[D]efendant's oral testimony that the local board did not listen or that it misbehaved towards him at the time of his appearance before it was not competent to avoid the [appeal board] classification. As stated by the Supreme Court in the *Cox* case [*Cox* v. *United States,* 332 U. S. 442, 454], 'It seems to us that it is quite in accord with justice to limit the evidence as to status in the criminal trial on review of administrative action to that upon which the board acted'."

These authorities are persuasive that defendant's attack on the action of the local board must fail. The classification of the appeal board in each case cited merely continued the registrant in the same classification previously given by the local board. In the case at bar, defendant would have the court inquire whether a basis in fact existed to support a I-A classification which the Presidential Board has set aside as erroneous and superseded with its own and different classification on which the order for his induction was issued. Perhaps defendant's theory is that, without the reclassification into Class I-A by the local board, he would never have had occasion to appear before the superior body which ultimately gave him the inductible I-A-O. Whatever his theory, his argument misconstrues the power of the courts to review classification orders under the "basis in fact" principle.

What has been said disposes of the only issue before the court in No. 11222, namely, whether the court below

erred in denying defendant's motion for a new trial, as well as defendant's principal argument in No. 11127. The newly discovered evidence on which defendant's motion for a new trial was based was relevant only to the question whether the superseded I-A classification given him by the local board rested on a basis in fact. For the reason previously stated, that issue was not before the court and the motion for a new trial was properly denied.

The order to report for induction was issued pursuant to the I-A-O classification given defendant by the Presidential Board. The indictment charges disobedience to that order. The only question before us on this phase of the case, therefore, is whether defendant's selective service file which was before that Board affords a basis in fact for the classification which it gave him.

We have previously defined the scope of judicial review within the basis in fact concept in cases of this nature in *United States* v. *Simmons*, 213 F. 2d 901, 903. Applying the principles there announced in the case at bar we cannot say that the I-A-O classification on which defendant's induction order was based is without basis in fact.

In view of the dearth of authority involving the I-A-O classification,[1] it is well at the outset to explore the purpose of that classification. Section 6(j) of the Act contemplates two separate groups of individuals who, by reason of religious training and belief, are conscientiously opposed to participation in war. Those who are found by the selective service agencies to be opposed to both combatant and noncombatant service are subject to induction into civilian work which contributes to national welfare but are exempt from military service. Those who are found to be opposed only to combatant service are subject to induction into the armed forces for non-combatant service as defined by the President. 50 App. U. S. C. § 456(j). The former group

[1] In the only reported opinion by a court of appeals involving the I-A-O classification, the Court of Appeals for the Ninth Circuit held that the failure of the registrant to assert that he was opposed to both combatant and noncombatant service and his emphasis in his Form 150 on opposition to combat and the use of carnal weapons were sufficient basis in fact for denying him the I-O and granting him the I-A-O classification. **Rowland v. United States, 207 F. 2d 621.**

is embraced within the selective service classification I-O while the I-A-O embraces the latter group.

Thus the classification I-A-O is designed to embrace those who are found to be conscientiously opposed to taking life or active participation in mortal combat, but not to service in support of others who do engage in combat. Inductees of this class are not required to bear arms but serve in the medical corps and other service units defined in Executive Order 10028.[2]

Defendant's file before the Presidential Board contains, in addition to his own professions of his religious beliefs, an elaborate summation of the history and tenets of the Harshmanites prepared by Rev. Leah L. Harshman, Pastor of the Church. The basic tenet of their faith is Christ's injunction to love thy neighbor as thyself. It is sad to relate that the sect's history records that, in obedience to their belief in this law of love, the congregation or certain of its members have suffered indignities varying from personal insults and destruction of property to physical assaults, apparently extending in one case to attempted murder, without raising a hand or voice in resistance by way of self help or resort to legal process. Such indignities are met literally by Christ's admonition to turn the other cheek. The members of the sect, described by one writer as "simple Tolstoyan non-resistors," are unalterably opposed to the use of force, and hold no malice toward those who do them harm. They do, however, recognize the importance of force as the ultimate instrument of the state to preserve itself. They recognize a duty of submission to the constituted authority of the state, "to render unto Caesar the things that are Caesar's," but refuse to participate by voting or otherwise in the functioning of secular government, since thereby they would yoke themselves with

[2] 14 F. R. 211. "(1) The term 'noncombatant service' shall mean (a) service in any unit of the armed forces which is unarmed at all times; (b) service in the medical department of any of the armed forces wherever performed; or (c) any other assignment the primary function of which does not require the use of arms in combat; provided that such other assignment is acceptable to the individual concerned and does not require him to bear arms or to be trained in their use.

"(2) The term 'noncombatant training' shall mean any training which is not concerned with the study, use, or handling of arms or weapons."

those who do not accept the law of love and become responsible for the acts of those not so restrained by the Harshmanite teachings.

The sect, however, is not only a religious group but also a semi-self-sufficient industrial community within the vicinity of Sullivan. During World War I many members of the sect were discharged from employment, and businesses owned by the group's members were boycotted by the Sullivan community as a result, as alleged, of hatred and mistrust engendered by the group's resistance to the draft. As a result the church itself felt driven to assume the obligation of furnishing employment to its members. This it did by sponsoring a small manufacturing plant under the name and style of "Community Industries." Today it employs not only members of the church, but also a number of resident non-members. During World War II, a part if not most of the production of this factory was of material for the armed forces under government contracts.

The question before us is not, as defendant contends, whether or not it is reasonable to deny a registrant a I-O classification because his church on whose tenets his claim of exemption rests, though devoted to pacifist doctrines, contributed to the war efforts of this country by manufacturing supplies and equipment for the armed forces. The determinative question on the file before us is whether the Presidential Board might reasonably have considered these facts a basis for the I-A-O classification which it gave defendant. We must answer that question affirmatively. The record supports the conclusion that the conscientious objection to participation in war which is a basis of the Harshmanite teaching is opposition to the actual use of force, but does not extend to the remote activities of the many who aid and support others who engage in mortal combat. Like a leaf severed from the life giving branch, the combat forces of a nation at war would wither and die without the lifeline of supply extending from the factories through service troops to the actual battleground. Who can say, in comparing the role of service troops with that of manufacturers, whose service is more important to an

overall war economy? Who can say that one group or the other bears the more intimate responsibility in prosecuting a war to conclusive decision? Can a real distinction be drawn, if the wearing apparel of the two groups be not taken into account? Our function does not extend to answering these questions, but their statement suggests the latitude of the conclusions permissible on consideration of defendant's file by the Presidential Board.

A second aspect of these facts, though little emphasized, lends support to the conclusion reached by the Board. That is the willingness, in the position taken by the Harshmanites, to profit from the remote activities of a wartime economy. When this facet is considered, the sect's beliefs inconsistent with participation in the armed forces are reduced to the professed unwillingness to "be yoked with" non-believers.

Harshmanite doctrine attempts to rationalize the seeming inconsistency in the dual position which this church has taken toward the wartime economy on considerations of responsibility. Thus the aloofness of the factory from the scene of combat is cited in support of the argument that the church merely manufactures products but does not accept the responsibility for their ultimate use since they are not directly involved in taking lives. It is not our function to evaluate this position. The weighing of the ultimate responsibilities arising out of the manufacture of materiel for the armed forces on the one hand against those arising out of non-combatant service on the other, is a question for the selective service agencies, not the courts. Thus defendant stated, "We do not consider ourselves responsible for what is done with the finished products which we manufacture since it is not directly involved in taking lives." The Presidential Board certainly could have concluded that the expressed objection extends only to direct involvement in taking lives and might have believed as does counsel for the government that "Logic finds no more welcomed door to the I-A-O classification."

Defendant based his claim for exemption on the teachings of the Harshmanite church. The exhaustive history

of that church and its tenets was placed in his file at his request, or by his Pastor on his behalf. He was aware of his associates' manufacturing activities, since he was a part of those activities as a factory worker throughout the period when he was prosecuting his claim. He steadfastly embraces all of its teachings and has at no time repudiated the stand taken by the church in the manufacture of war supplies. While each question of a claim of privilege must be determined on the evidence submitted by the particular registrant, *United States* v. *Simmons*, 213 F. 2d 901, 904-5 (CA-7), the teachings of a sect may be such that a registrant is placed in the anomolous position of being subject to an inductible classification unless he is willing to repudiate the doctrines of the church on whose teachings his claim of exemption rests. Since he makes the teachings of the church his own beliefs, the classification given him is an objective one based on such beliefs and is not subject to the charge of arbitrary discrimination against his religious sect as such. We cannot say that no basis in fact supports the classification which the Presidential Board gave defendant.

We must consider briefly the contentions that the local board's written summary of evidence considered by it was unfair and untrue and that the appeal board could not fairly consider defendant's claim because of this summary. Assuming the charge of unfairness to be true, we agree with the trial court that the defendant was not prejudiced thereby. He was given the opportunity to place whatever he desired in his file on appeal. His file before the board contained his statement of objections to this summary, in addition to some 24 pages of materials designed to prove error in the local board's classification. The Presidential Board did set aside the I-A classification and give defendant the I-A-O. This procedure conforms with Selective Service Regulation 1626.12, 32 C. F. R. § 1626.12, and the classification on which his induction order was based is not subject to collateral attack on this ground. *Davis* v. *United States*, 203 F. 2d 853, cert. denied 345 U. S. 996

(CA-8); *Tyrrell* v. *United States*, 200 F. 2d 8, cert. denied 345 U. S. 910 (CA-9).

We have considered the authorities cited by defendant; none of them militates against the conclusion expressed herein. For the reasons stated, we cannot say that defendant's I-A-O classification is without basis in fact or that error was committed by the trial court in defendant's trial.

Both judgments are

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

Thursday, December 9, 1954

Before
Hon. F. Ryan Duffy, Chief Judge
Hon. J. Earl Major, Circuit Judge
Hon. Walter C. Lindley, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
No. 11127 *vs.*
PERRY BOWEN MOORE, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

Thursday, December 9, 1954

Before
Hon. F. Ryan Duffy, Chief Judge
Hon. J. Earl Major, Circuit Judge
Hon. Walter C. Lindley, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 11222 *vs.*
PERRY BOWEN MOORE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed.

APPENDIX "B".

Statutes and Regulations Involved

Section 1 (c) of the Universal Military Training and Service Act (50 U. S. C. App. (Supp. V) § 451 (c)) provides:

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and *which is consistent with the maintenance of an effective national economy.*"—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1(a) 65 Stat. 75. (Emphasis supplied)

Section 6(j) of the act (50 U. S. C. App. (Supp. V) § 456(j), 65 Stat. 75, 83, 86) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to per-

form for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recom-

mend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—50 U. S. C. App. (Supp. V) § 456(j), 65 Stat. 75, 83, 86.

Section 12(a) of the act (50 U. S. C. App. (Supp. B) § 462(a)) provides:

". . . Any . . . person . . . who . . . refuses . . . service in the armed forces . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

Section 1622.14 of the Selective Service Regulations provides:

"Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest. (a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and noncombatant training and service in the armed forces."

Sec. 1622.1(d) of the Selective Service Regulations provides:

"(d) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity

in any labor, political, religious, or other organization. Each such registrant shall receive equal justice."

Sec. 1625.2 of the Selective Service Regulations provides:

"1625.2 When Registrant's Classification May Be Reopened and Considered Anew.—The local board may reopen and consider anew the classification of a registrant . . . upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Sec. 1626.13 of the Selective Service Regulations provides:

"1626.13 Local Board to Prepare Appeal Record and Forward File.— . . . The local board shall carefully check the registrant's file to make certain that all steps required by the regulations in the chapter have been taken and that the record is complete. If any information considered by the local board does not appear in the written information in the file, other than information presented orally by the registrant or in his behalf at a personal appearance under the provisions of section 1624.2 of this chapter, the local board shall prepare and place in the file a written summary of such information . . ."

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	4
Argument	11
Conclusion	20

CITATIONS

Cases:

Bowles v. *United States*, 319 U. S. 33	15
Cox v. *United States*, 332 U. S. 442	18
Cramer v. *France*, 148 F. 2d 801	16
Davis v. *United States*, 203 F. 2d 853, certiorari denied, 345 U. S. 996	16
Estep v. *United States*, 327 U. S. 114	18
Gillars v. *United States*, 182 F. 2d 962	19
Gonzales v. *United States*, No. 69, O. T. 1954	14
Reed v. *United States*, 205 F. 2d 216, certiorari denied, 346 U. S. 908	15
Sicurella v. *United States*, No. 250, O. T. 1954	14
Simmons v. *United States*, No. 251, O. T. 1954	14
Tyrrell v. *United States*, 200 F. 2d 8, certiorari denied, 345 U. S. 910	16
United States v. *Hagaman*, 213 F. 2d 86	18
United States v. *Miller*, 236 Fed. 798	19
United States v. *Wilson*, 215 F. 2d 443	18
White v. *United States*, 215 F. 2d 782	14
Witmer v. *United States*, No. 164, this term	14

Statute:

Universal Military Training and Service Act, 62 Stat. 604, 612, 622; 65 Stat. 75, 86: Section 6 (j) (50 U. S. C. App 456 (j))	2

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QUESTIONS PRESENTED

1. Whether there was basis in fact for petitioner's final classification as available for noncombatant military service.

2. Whether petitioner was denied procedural due process.

3. Whether witnesses who not only refused to be sworn but also refused to affirm under pain of perjury were properly denied the right to testify on behalf of the defense.

STATUTE INVOLVED

Universal Military Training and Service Act, 62 Stat. 604, 612, 622; 65 Stat. 75, 86:

Section 6 (j) [50 U. S. C. App. 456 (j)]:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the

armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to par-

> ticipation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *

STATEMENT

Petitioner seeks review of a judgment of the Court of Appeals for the Seventh Circuit (Pet. 13a) affirming the two-year sentence imposed by the District Court for the Northern District of Illinois (R. 6–7) on petitioner's conviction for refusal to be inducted into the armed forces for noncombatant service (R. 6–7).

Petitioner's record with the Selective Service System (Gov. Ex. A) may be summarized as follows:

Petitioner registered under the selective service laws on April 7, 1950 (Gov. Ex. A, pp. 1, 4).

On March 22, 1951, he executed a questionnaire in which he gave his occupation as an employee of "Community Industries," a business organization run by his religious sect for the primary purpose of making tractors, and indicated that he made 75 cents per hour and worked a 40-hour week in this job (*Ibid.*, p. 7–A). He indicated that he was making a claim to conscientious objector status, and that he thought that his classification should be 4–E (the old designation for conscientious objectors) because of his religion (*Ibid.*, p. 9).

On April 6, 1951, petitioner's local board received from him the special form for conscientious objectors (*Ibid.*, pp. 11–12–A). In the space in which he was asked to describe the nature of his belief he wrote:

> God created the earth and brought man into the world to follow Him. He sent His only son into the world to die for us. To me it involves duties superior to those arising from any human relations.

He indicated that he received his religious training by going to church; that he relied on his minister, Leah Harshman, for religious guidance; that he did not believe "in force of any kind", and that he had given expression to his belief in his church. In the space in which he could indicate the actions and behavior in his life which most conspicuously demonstrated the consistency and depth of his religious convictions, he wrote,

"by denying myself of worldly pleasures". Petitioner stated that he belonged to the "Harshmanite" church, otherwise known as the Church of Christ, a communal religious sect centered in Sullivan, Illinois, which ran "Community Industries", the tractor factory which employed him. He indicated that the creed or official statement of his church is (*Ibid.*, p. 12):

> The Bible says that you shall love your emenies [sic] and to go to war with them is not showing love.

On April 19, 1951, petitioner was classified 1–A (available for full military service) by unanimous vote of his local board, and he was so notified on April 23, 1951. At his request he was granted a personal interview before his local board, and on November 5, 1951, he was notified that he had been granted a 1–O classification, i. e., exemption from combatant and noncombatant service (*Ibid*, p. 9–A).

Subsequently, the local board received from the State Appeal Board several other case files involving Harshmanites, who, though in almost the identical position as petitioner, had been classified 1–A by the appeal board (R. 88, 96, 129–130, 141–147). There was also transmitted a letter to the appeal board to which was attached a petition of 354 residents of Moultrie County, to the effect that they did not believe the Harshmanite young men were true conscientious objectors since their commercial enterprise, "Community Industries",

although regularly in the business of making candy, dresses, and garden tractors, worked on war contracts during World War II producing tents, tarpaulins, and ammunition boxes for the government, and during the then emergency had at least three government contracts (Def. Ex. 1).

At a meeting of the local board on December, 1951, the chairman informed the board of these communications and the board reconsidered the files of the remaining 1–O Harshmanites, including petitioner's. They decided to reclassify them 1–A (Gov. Ex. A, pp. 1, 9–A; R. 23, 96). On being so notified, petitioner requested and was granted another personal appearance before the board on January 4, 1952 (Gov. Ex. A, p. 9–A). On the basis of this new interview in which the new evidence was discussed, and on the basis of the appeal board action taken in the other Harshmanite cases, petitioner was retained in 1–A (Gov. Ex. A, p. 9–A; R. 93–94). A three-page statement was thereafter prepared by the local board and placed in petitioner's selective service file in order to record the basis of its action (Gov. Ex. A, pp. 18–20; R. 49, 85, 93).[1] In addition to setting forth the facts as to the prior action by the appeal board and the petition of the residents of the county, the local board noted that while the Harshmanites refuse military service

[1] The communication from the appeal board containing the petition of the residents of the county was placed in the local board's classified file (R. 31–32).

because they "cannot take orders from any persons except a member of their own sect" this position did not appear to be valid since they take orders in school, obey law enforcement agencies, and pay fines and taxes.

After noting an appeal petitioner addressed a letter to the appeal board (Gov. Ex. A, p. 22) in which he contended that one of the religious principles was "non-resistance", and "to be in Military Service and take up arms would be directly against the principles I have based my life on". He also filed extended statements written by his pastor, Leah L. Harshman, a daughter of the founder of the sect, in which she set forth the history of the Harshmanite faith and explained its tenets (Gov. Ex. A, pp. 23–42). She stated that members of the sect do not "accept or exercise any of the powers and privileges of citizenship", and refrain from joining organizations, because of the Biblical admonition (*Ibid.*, p. 25):

> Be not unequally yoked together with unbelievers.

This principal of "unequal yoking" forbids the young Harshmanites from joining the army on any basis (*Ibid.*, p. 26), since to do so "would be to put one's self voluntarily in the way of temptation" (*ibid.*, p. 31), and like any other "yoking together" with unbelievers, would be demoralizing as "evil communications corrupt good manners" (*Ibid.*, p. 38), and "any fleshly bond of union, however slight, will prove a snare to the church" (*Ibid.*, p. 39).

Miss Harshman explained the attitude of Harshmanites toward war as follows (*Ibid.*, p. 31):

> * * * we are not political pacifists. We do not feel that it is our mission to change existing governments. We do not try to abolish war. Christ said: "If my kingdom were of this world, then would my servants fight that I should not be delivered to the Jews, but now is my kingdom not from hence." Our warfare is a spiritual warfare to the end that the kingdom of Christ may be maintained on the earth. Governments as now constituted are maintained and administered by physical force. War is a necessary means of their existence and defence. This we recognize. We cannot participate in such governments nor take part in any way in the hatred and violence and slaughter which is war. We find it impossible to love our enemies and at the same time go about to kill them.
>
> * * * * *
>
> On the other hand we do owe the government any service it might demand that does not involve personal participation in the act of war. We are in fact willing to produce anything needed by the government when it is engaged in carrying on war. We do not feel that doing so makes us responsible for war or the waging of war. We would not willingly engage in the production of any article used directly

> to cause death. That would be repugnant to our principles and mission in this world.

On May 7, 1952, the appeal board made an initial determination that petitioner "should not be classified in either Class I–O [conscientious objector] or Class I–A–O [available for noncombatant military service]" (Gov. Ex. A, p. 9–A). Petitioner's file was transmitted to a Department of Justice hearing officer and a personal hearing was held on August 1, 1952. Although the hearing officer found petitioner to be sincere and recommended that he be classified I–O (*Ibid.*, p. 51), the Department of Justice recommended to the appeal board that he be classified I–A–O. The Department's letter states (*Ibid.*, p. 51):

> It is concluded, however, while registrant has sincere religious convictions against the actual taking of life and bearing arms, that his employment in a factory engaged in the manufacture of war goods is inconsistent with his claim to exemption from noncombatant service.[2]

The appeal board continued petitioner in class 1–A (*Ibid.*, p. 56), a classification which was continued after review by the State Director (*Ibid.*, p. 62–63, 66, R. 28). On July 1, 1953,

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[2] On April 9, 1953, petitioner wrote to the appeal board challenging the Department of Justice letter. He said (*Ibid.*, p. 55):

"We do not consider ourselves responsible for what is done with the finished products we manufacture since it is not directly involved in taking lives."

the National Director of Selective Service took an appeal to the President (*Ibid.*, p. 67), despite the unanimous vote of the appeal board.

Leah Harshman wrote a letter to the Presidential Appeal Board in which she reiterated that her sect was "forbidden to be yoked together with unbelievers in any sort of union on a common basis for a common purpose" (*Ibid.*, p. 60).

On September 9, 1953, the National Appeal Board classified petitioner I–A–O (available for noncombatant military service) by a 2 to 1 decision[3] (*Ibid.*, pp. 10, 69–70). Petitioner was thereafter ordered to report for induction on October 20, 1953 (*Ibid.*, pp. 10, 71). He reported but refused to submit to induction on October 21, 1953 (*Ibid.*, p. 72), stating that his position was (*Ibid.*, p. 73) "love your enemies and show love at all times."

ARGUMENT

1. Petitioner's final I–A–O classification by the Presidential Appeal Board rendered him liable to service with the military or naval forces in a *noncombatant* status only. Necessarily implied in this classification is a finding that he was conscientiously opposed, by virtue of his religious training and beliefs, to bearing arms or killing in armed combat. Petitioner contends, however (Pet. 20–21, 25–26) that the I–A–O classification

[3] The record does not disclose the position of the one dissenter.

did not comprehend the full scope of his religious scruples, and that on the basis of the evidence set forth in his selective service file it was incumbent on the Selective Service System to find he was also opposed to any participation in war including noncombatant service. His own assertions and those of his religious leaders do not, however, establish I–O (conscientious objector) status.

The I–O classification was obviously intended for those who on religious grounds have scruples, not only against bearing arms and killing, but also against the indirect support of the war effort involved in the life-saving duties required of I–A–O inductees. Such is not the nature of petitioner's objection to service. The real essence of petitioner's claim may be simply stated. He lives, works, and worships with a small insulated religious community which forbids close association or "yoking together" with "unbelievers". This is the basis of his refusal to belong to the army even in a noncombatant capacity. In other words, his objection to military service is not predicated on an objection to "participation in war" in the statutory sense, but is an objection to participation in any grouping which is not controlled by his own religious community. The objection he has to joining the army is precisely the same that he has to joining a fraternal lodge or a luncheon club. His "objections" are unrelated to the narrow purpose which Congress intended in exempting those who have a deep-

seated religious revulsion to helping the war effort even in an indirect way.

The record shows that petitioner had no scruples against working for "Community Industries" at a time when that communal tractor factory was working under three government contracts during the Korean War emergency.[4] His religious community had no compunction against acting as a war contractor for the government during World War II, and apparently was content to profit from the war situation as a direct supplier to the war effort. Such willingness to cooperate with the prosecution of the war is entirely inconsistent with conscientious objection to *noncombatant* "participation in war in any form". Petitioner, if inducted, would not be called upon to perform duties any more closely related to waging war than his civilian occupation. I–A–O inductees have almost uniformly been used for medical and hospital work[5]—duties

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[4] Petitioner consistently and erroneously attempts to minimize the proximity of his duties in "Community Industries" to the waging of war. The record is clear however that he was engaged in supply work under government contract for shipment to the armed services. His position was no less proximate to the fighting than many stateside troops of the supply services. (Gov't Ex. A, pp. 18–20, 50–51, 55, 60–61.)

[5] All I–A–O (available for noncombatant duty) registrants were, under the 1940 law, assigned to medical and hospital activities. Selective Service System Monograph No. 11, "Conscientious Objection", p. 332. We are informed by Army authorities that presently all I–A–O inductees are automatically assigned to the medical department by the

which involve saving life rather than taking it. While such persons wear a uniform they are regarded as non-belligerent by the nations of the world.[6] Nowhere in petitioner's selective service file, aside from statements of objection to association with non-believers, is there any statement which could be reasonably interpreted to forbid such life-saving activities.

This case is, therefore, basically very similar to that presented by many Jehovah's Witnesses cases, where the government contends that the objection to service is not fundamentally an objection to war but to submitting to governmental authority. In particular it is very close to *White* v. *United States*, 215 F. 2d 782 (C. A. 9), petition for certiorari pending, No. 390, this Term, where the Court of Appeals considered employment in an aircraft factory during the Korean emergency inconsistent with I–O status. While, as in White, the I–A–O classification distinguishes this case from the Jehovah's Witnesses cases presently before the Court for decision,[7] all of which

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Adjutant General's Department unless they request in writing a different assignment. See: Ex. Ord. 10028, 14 F. R. 211 (Pet. 8a).

[6] Pursuant to Articles 19–32 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 (Dept. of State Pub. 3938, 1950), medical personnel are placed in a special non-belligerent category. They wear a brassard indicative of their position, they do not engage in combat, and they are given a special protected status both on the battlefield and in the event of capture.

[7] *Sicurella*, No. 250, *Witmer*, No. 164, *Gonzales*, No. 69,

involve I–A classifications, a decision by this Court on the relationship between religious objection to government authority and the statutory exemption may have some bearing on the issues presented by this case. We therefore suggest that it would be appropriate to defer action on this petition until the cases now before this Court are decided.

2. Petitioner also contends that he was denied procedural due process by the Selective Service System. The main thrust of his attack (Pet. 21–25) is against the local board proceedings which were superseded by *de novo* consideration of his entire case both by the appeal board and the National Board. The exhaustive review proceedings took into account not only the evidence before the local board, but extensive new evidence submitted by petitioner and the leader of his sect. Under such circumstances it was incumbent on the petitioner to show in the criminal proceeding that any procedural errors were not cured within the Selective Service System itself, and that such errors somehow infected the final classification which is the basis for the order to report for induction. *Bowles* v. *United States*, 319 U. S. 33, 35–36; *Reed* v. *United States*, 205 F. 2d 216 (C. A.

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and *Simmons*, No. 251. Both *Gonzales* and *Simmons* involve registrants who had engaged in employment directly related to the Korean War effort, and in each case such fact, in combination with other facts, was considered a basis for denial of I–O status. Gonzales worked in a steel plant, and Simmons worked as a civil employee at a naval station.

9), certiorari denied, 346 U. S. 908; *Davis* v. *United States,* 203 F. 2d 853 (C. A. 8), certiorari denied, 345 U. S. 996; *Tyrrell* v. *United States,* 200 F. 2d 8 (C. A. 9), certiorari denied, 345 U. S. 910; *Cramer* v. *France,* 148 F. 2d 801, 805 (C. A. 9). This he has not done, even assuming *arguendo* a sound basis for his assertions of error.

Petitioner contends for example that his local board erred in changing his I–O classification to I–A on the basis of the action by the state appeal board in similar Harshmanite cases (Pet. 26–29). This assumption that petitioner was reclassified only on the basis of what appeared in other files is, in the first place, in error, since his reclassification was reaffirmed on evidence received from him in a personal appearance after receipt and inspection of the other Harshmanite files (R. 93). In the second place, the validity of his I–A classification by the local board is under the cases cited above irrelevant to the consideration of whether his final I–A–O classification was arbitrarily rendered by the National Board. Moreover, selective service classifications can be changed at any time, and petitioner's local board was justified, in the interest of rendering equal treatment to all, in questioning its past action on the basis of new facts and the reasoning of the superior board and in calling petitioner in to reexamine his beliefs in the light of the new findings.

Petitioner also attacks the accuracy of a three-page summary of the oral and documentary evidence prepared by his local board and included in his file after his hearing (Gov. Ex. A, pp. 18–20). The summary states, *inter alia*, that "a further weight of evidence is that the board has, in its files, a petition, signed by three hundred and fifty-four (354) residents of Moultrie County who also do not believe the members of this faith are true conscientious objectors." Petitioner contends that this statement is an inaccurate recapitulation of what was said in the petition (Pet. 21–25). Reference to the original document and the letter of Donald J. Messmore to which it is attached, and which is therefore adopted by reference, show that this statement is a fair summary of those documents to which the townspeople recorded their approval (see Def. Ex. 1). The local board members testified on the trial that such was their understanding (R. 34, 49–50), and the trial judge apparently resolved the issue contrary to petitioner's present contention. In any event the issue of whether the 354 signators believed or disbelieved that petitioner was a true conscientious objector could have no bearing on his final I–A–O classification by the Presidential Appeal Board which recognized that petitioner was in fact sincerely opposed to combatant service.[8]

[8] We do not believe the cases cited by petitioner are apposite. Unlike the instant case they involve violations of

Finally, petitioner attacks the classification of the Presidential Appeal Board apparently on the ground that it rendered no written opinion setting forth its reasoning in classifying him (Pet. 6, 28–29). There is, however, no requirement for such an opinion. The task of the court on collateral review of selective service procedures is not to review administrative opinions but to search the selective service file for any basis in fact to support the final classification. *Cox* v. *United States*, 332 U. S. 442, 448–449; *Estep* v. *United States*, 327 U. S. 114, 122–123. This was the test employed in *United States* v. *Wilson*, 215 F. 2d 443 (C. A. 7), cited by petitioner, the court merely finding that there was no basis in fact for the final I–A classification. Nowhere in that opinion was it held that the Presidential Appeal Board must, in obedience to some uncited authority, render an opinion for the purpose of future judicial review. The only case support for such argument is dicta in *United States* v. *Hagaman*, 213 F. 2d 86, 89 (C. A. 3), where the court mentioned the lack of a written opinion as a "procedural deficiency". The court did not, however, reverse on that ground and admitted that such an opinion (*ibid.*, p. 89) "* * * is not necessary at all in the usual case where the issue in controversy and the basis of decision are made apparent

selective service regulations which the court in each case deemed to deprive the local board proceeding of essential fairness.

by the record itself." See dissenting opinion of Judge Goodrich (*ibid.*, p. 94): "We do not think that judges are authorized to impose such a requirement."

3. Finally, petitioner contends that the trial court erred in excluding him as a witness in his own behalf (R. 138–139) and also other witnesses (who did not even take the stand (R. 140)) on the refusal of each either to take the oath or to affirm that his testimony would be truthful (Pet. 29).

At common law, an oath was a requisite to competency as a witness. *Gillars* v. *United States*, 182 F. 2d 962, 969–970 (C. A. D. C.); *United States* v. *Miller*, 236 Fed. 798 (W. D. Wash.); VI Wigmore, *Evidence* (3d ed. 1940) Secs. 1813–1827. Although Rule 26 of the Federal Rules of Criminal Procedure, dealing with testimonial competency, adopts "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience," that is now interpreted to allow for affirmation under pain of perjury in lieu of the oath. *Gillars* v. *United States, supra* (182 F. 2d at pp. 969–970); VI Wigmore, *supra*, Secs. 1827–1829. There is no authority for the proposition that "the principles of the common law" (Rule 26, F. R. Crim. P.) allow a witness to take the stand without affirming the truthfulness of his testimony and without placing himself under pain of perjury.

CONCLUSION

The decision below is correct on the facts and is not in conflict with any decisions of other courts of appeals. Inasmuch, however, as it involves issues the determination of which may be affected by this Court's decision in other cases now pending before it, it is suggested that it would be appropriate for the Court to defer action on this petition until the pending cases are decided.

Respectfully submitted.

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No. 521. MOORE *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. *Per Curiam:* The petition for certiorari is granted. Petitioner and witnesses tendered by him declined, because of religious scruples against oath-taking, to use the word "solemnly" in affirming to tell the truth. The trial court refused to permit them to testify. There is no requirement that the word "solemnly" be used in the affirmation, and the judgment of conviction is therefore reversed and the case remanded for a new trial. *Francis Heisler* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 217 F. 2d 428.

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*MR. JUSTICE HARLAN took no part in the consideration or decision of the cases in which orders were this day announced.